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Klodian Rado

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THE RELATIONSHIP BETWEEN HUMAN RIGHTS AND JUDICIAL GLOBALIZATION

KLODIAN RADO*

There are numerous academic writings about the actors, factors, and mechanisms that shape and drive human rights at national, transnational, and international levels. However, the relationship between *human rights* and the process of *judicial globalization* remains underexplored in recent scholarship, and the purpose of this study is to explore such a relationship and its effects. First, we provide a brief theoretical background of both *human rights* and *judicial globalization* concepts, and then, we focus on the relationship between them. By investigating existing empirical data, we uncover how judicial globalization is effecting and shaping human rights through various mechanisms and their classifications. Finally, by using the theoretical and empirical tests, we respond to the normative question, whether the judicial globalization process is a suitable tool for the development of human rights at national, international, and transnational levels. The results of this paper show that human rights and judicial globalization have a strong, mutual, and complex relationship. The most important mechanisms that build such a relationship are: constitutional cross-fertilization; relationships between international/supranational courts and national courts; face-to-face-meetings of judges around the world; establishing of global/regional organizations/associations of judges; establishing of electronic networks and systems; and establishing of global judicial education and training institutions. We argue that in the absence of a World Court of Human Rights, one of the most suitable tools for the spread of a shared understanding of human rights is through the bottom-up process of judicial globalization conducted by the world community of constitutional, supranational, and international courts and judges.

* Ph.D. Candidate Osgoode Hall Law School; Magistrate Judge – School of Magistrates of the Republic of Albania; LLM – King’s College London, UK; LLM – University of Tirana, Albania; LLB – University of Tirana, Albania.

INOWADAYS, there are many actors, factors, and mechanisms that shape and drive human rights at national, transnational, and international levels, of which globalization is certainly a major one. Its role and impact on human rights are being acknowledged even by the United Nations General Assembly, which considers globalization to be “not merely an economic process but [one that] has social, political, environmental, cultural and legal dimensions which have an impact on the full enjoyment of all human rights.”¹

Acknowledging the relationship between human rights and globalization, the purpose of this paper is to explore the relationship between human rights and judicial globalization, one of the most significant forms of globalization. *Judicial globalization* has recently been used to define a global, diverse, and messy process of judicial interaction between courts and judges across, above, and below borders, exchanging ideas and cooperating in cases involving national as well as international law, through the use of a variety of mechanisms.²

Although the academic attention paid to both human rights and globalization is impressive, surprisingly, there is a huge gap in the scholarly literature about human rights and their relationship with the process of judicial globalization. As a former judge, my interest in this subject has always been great. Therefore, in order to explore my interest, and to fill the gap in the academic literature, my central questions for this article are: To what extent is there a relationship between human

¹. See: Res No. 63/176, 20 March 2009, of The General Assembly of the UN about “Globalization and its impact on full enjoyment of all human rights”). Online: <<http://www.worldlii.org/int/other/UNGARsn/2008/199.pdf>>.

². Anne-Marie Slaughter, “Judicial Globalization” (1999-2000) 40 Va J Int’l L 1103 at 1104. She is the first scholar who introduced this concept and also tried to give a definition of it. However, I am adding that Judicial Globalization is exercised “through the use of a variety of mechanisms”, and for the first time, through this paper I am contributing by classifying them and showing how each of these mechanisms effects and shapes human rights at national, transnational and international level.

rights and the process of judicial globalization? What are the mechanisms of such a relationship? Is it a suitable phenomenon for the development of human rights?

To respond to these questions I will first provide a brief theoretical background of both *human rights* and *judicial globalization* concepts; second, I will focus on the relationship between human rights and the process of judicial globalization by looking at various mechanisms of the relationship; and finally, I will try to respond to the normative question: Is the judicial globalization process a suitable tool for the development of human rights at national, international, and transnational levels?

II. UNDERSTANDING THE CONCEPTS OF HUMAN RIGHTS AND JUDICIAL GLOBALIZATION

A. THE CONCEPT OF HUMAN RIGHTS

Still today, it is impossible to find a universally accepted definition of human rights among scholars. Regarding the origin of human rights, their roots could be found since the very beginning of humanity, in the divine laws of monotheistic religions, in the ancient Asian traditions and religions, and/or in the ancient Babylon, Greeks or Roman Empire.³ Philosophers such as Aristotle, Plato, Cicero, Epictectus, Confucius, Avicena, Aquinas, and later, Grotius, Locke, Montesquieu, Rousseau, and Kant, engaged with the substance of human rights, and many of them considered human rights to be above even the state.⁴ These roots may suggest that human rights are obvious, unambiguous, derived from reason, and above all, universal. Other human right scholars doubt or

³. For a very interesting collection of major essays, documents, or speeches from ancient times to the present, about the origins and development of human rights, see: Micheline R. Ishay, *The Humn Rights Reader: Major Political Essays, Speeches, and Documents From Ancient Times to the Present* (New York: Routledge Press, 2007).

⁴. *Ibid* at 8. See also: Jerome J. Shestack, "Globalization of Human Rights Law" (1997) 21 Fordham Int'l LJ 512 at 512.

do not accept their existence at all.⁵ In between these two extreme views stand others who consider human rights to be agreed upon or fought for.

It is important to note that it is difficult to categorize or classify these views because most human right scholars have individual approaches towards them.⁶ However, for the purpose of this paper, despite its limitations, I will use Dembour's classification of human right scholars, because it simplifies the understanding of human rights and points out their main elements that may be effected by the process of judicial globalization.⁷ Based on an analysis of academic literature regarding human rights, she identifies four schools: the *natural school*, which considers human rights to be *given*; the *deliberative school*, which considers them to be *agreed upon*; the *protest school*, which considers them to be *fought for*; and the *discourse school*, which considers them to be *talked about*.⁸

The natural school, which traditionally represents the very heart of the human rights orthodoxy, considers them to be derived from God, the universe, nature, or reason. They see human rights as being given to humans simply by virtue of being alive.⁹ As such, human rights are entitlements that are universal, absolute, and negative in character that can exist independently of

⁵ Alasdair MacIntyre, *After Virtue: A Study in Moral Theory*, 3rd ed (Notre Dame, Indiana: University of Notre Dame Press, 2007) at 68-69; Wendy Brown, "The Most We Can Hope For. . .": Human Rights and the Politics of Fatalism" (2005) 103:2/3 S Atl Q 451 at 453; Makau Mutua, *Human Rights: A Political and Cultural Critique* (Philadelphia: University of Pennsylvania Press, 2002) ix-x; Shannon Speed, *Rights in Rebellion: Indigenous Struggle and Human Rights in Chiapas* (Stanford: Stanford University Press, 2008) 181.

⁶ Human rights are organized and classified in a number of different ways, not only by scholars but also by the national and international human rights charters. For recent models and ideas about human rights classification see: Jack Donnelly, *Universal Human Rights in Theory and Practice* (Ithaca and London: Cornell University Press, 2013) 17, 75-102.

⁷ Marie-Bénédicte Dembour, "What Are Human Rights? Four Schools of Thought" (2010) 32:1 Hum Rts Q 1 at 20. Even the author herself acknowledges in the same paper the limitations of such classification.

⁸ *Ibid* at 2.

⁹ Alan Gewirth, *The Community of Rights* (Chicago: University of Chicago Press, 1996) at 9; Jack Donnelly, *Universal Human Rights in Theory and Practice*, 2nd ed (Ithaca: Cornell University Press, 2003) at 9; Michael J. Perry, *The Idea of Human Rights: Four Inquiries* (Oxford University Press, 1998) at 11; Mark Goodale, *Surrendering to Utopia: An Anthropology of Human Rights* (Stanford: Stanford University Press, 2009) at 37.

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social or state recognition. Natural scholars welcome the recognition of human rights by the state and its inscription into positive law in order to respect, protect, and promote them. The universal, natural, and even transcendental characters of the origin of human rights make them unquestionably universal and applicable to all humans, and obviously above the states.¹⁰

The deliberative school believes human rights to be agreed upon values that (mostly) liberal societies choose to adopt through societal agreements—in other words, through constitutional law. They reject the natural or transcendental origins of human rights. According to deliberative scholars, human rights can and should be universal; however, this requires not only time but also global commitment and agreement that human rights are the best possible political and legal standards for every nation and the entire global community. Since Rousseau considered the state to be a “societal agreement,” this school of thought has gotten a lot of attention, and it is becoming more and more popular.¹¹

The protest school perceives human rights as rightful claims made by or on behalf of the oppressed, unprivileged, or minorities in order to achieve justice. As the label of this school suggests, protest scholars advocate real efforts, protesting, and even fighting for human rights until they are fully achieved. Similar to natural scholars, they accept that human rights have transcendental or natural origins, are corrupted by the elite, and that every nation and the entire global society should fight for human rights standards to address the injustice. Protest scholars, similar to the two previous types of scholars, agree upon a global agenda for human rights in order

¹⁰. Ishay, *supra* note 3 at 1-37.

¹¹. Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Cambridge, Massachusetts: MIT Press, 1996) at 126-28; Michael Ignatieff, *Human Rights as Politics and Idolatry* (Princeton: Princeton University Press, 2001) at 83; Sally Engle Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice* (Chicago: University of Chicago Press, 2006) 220.

to achieve them on a global scale, although they seem to be more skeptical than the other types of scholars.¹²

The discourse school considers human rights to be non-existent and believes that they are part of the legal and political discourse only because people talk about them. Discourse scholars do not believe in human rights, and according to them, human rights are neither natural nor the best solution for solving the problems of the world. According to them, human rights are just strong political language that does not deserve any global consideration.¹³

I do not use the above classification to claim that this is the only way to perceive human rights, and that everybody writing about human rights has to fall within one of the above categories. Undoubtedly, every school has persuasive arguments and offers interesting elements of the concept of human rights; however, many human rights scholars may fall in between. This is just a general map that tries to demonstrate the four biggest approaches to the most important questions regarding human rights: the origin of human rights; concrete realization-implementation; universality or relativism; and whether one can or should believe in human rights.¹⁴ I use this classification in order to better understand human rights from the perspective of their relationship with the process of judicial globalization, and particularly for a better respond to the normative question: whether and to what extend the judicial globalization process is a suitable tool for the development of human rights at national, international, and transnational levels.

¹². Jacques Derrida, *On Cosmopolitanism and Forgiveness* (London: Routledge, 2001) 3; Neil Stammers, *Human Rights and Social Movements* (London: Pluto Press, 2009) 1; Upendra Baxi, *The Future of Human Rights*, 2nd ed (Oxford: Oxford University Press, 2006) 6; June C. Nash, *Mayan Visions: The Quest for Autonomy in an Age of Globalization* (Psychology Press, 2001) 213.

¹³ See: Alasdair MacIntyre, *supra* note 5 at 68-9; Wendy Brown, *supra* note 5 at 453; Makau Mutua, *supra* note 5 at ix-x; Shannon Speed, *supra* note 5 at 181.

¹⁴. Obiora Chinedu Okafor, lecture on International Human Rights Law (3440.04), Osgoode Hall Law School, 10 January 2014. (Discussions about the most important questions on Human Rights).

B.THE CONCEPT OF JUDICIAL GLOBALIZATION

Judicial globalization is an ongoing and dynamic process. It has been defined as a global process of judicial interaction between national and supranational/international courts and judges, exchanging ideas and cooperating in cases involving national as well as international law, through the use of a variety of mechanisms.¹⁵ Similar to the other dimensions of globalization, judicial globalization is a very controversial stream and often provokes skepticism, not only among academics but also in legal and sociopolitical contexts.¹⁶

Slaughter, one of the proponents of judicial globalization, and who is generally accepted to be the first scholar to introduce the concept of judicial globalization in the academic arena, recognizes judicial globalization, tries to define it, and explains the different instruments used in this process.¹⁷ She asks judges from around the world to “see one another, not only as servants or even representatives of a particular government or polity, but as fellow professionals in a profession that transcends national borders.”¹⁸

Another prominent figure of judicial globalization is the Honorable Claire L’Heureux-Dubé, former Justice of the Supreme Court of Canada. According to her, almost all courts are

¹⁵. Anne-Marie Slaughter, *supra* note 2 at 1104.

¹⁶. Kenneth I. Kersch, “The ‘Globalized Judiciary’ and the Rule of Law” (2004) 13:3 *Good Soc’y* 22; Kenneth I. Kersch, “The New Legal Transnationalism, the Globalized Judiciary, and the Rule of Law” (2005) 4:2 *Wash U Glob Stud L Rev* 345 at 387.

¹⁷. Anne-Marie Slaughter has pioneered this phenomenon in several important articles. See: Anne-Marie Slaughter, “A Typology of Transjudicial Communication” (1994) 29:1 *U Rich L Rev* 99 at 118; Anne-Marie Slaughter, “A Global Community of Courts” (2003) 44 *Harv Int’l LJ* 191 at 192; Anne-Marie Slaughter, *A New World Order* (Princeton: Princeton University Press, 2004) 65-103; Anne-Marie Slaughter, *supra* note 2 at 1104. (Anne-Marie Slaughter does not speak of different forms of JG. She simply categorizes “five different categories of judicial interaction: (1) relations between national courts and the ECJ in the EU; (2) interactions between the European Court of Human Rights and national courts; (3) the emergence of “judicial comity” in transnational litigations; (4) constitutional cross-fertilizations; (5) and face-to-face meetings among judges around the world”).

¹⁸. Anne-Marie Slaughter, *supra* note 2 at 1124.

engaged in a global dialogue on human rights and other important common legal questions, and it is no longer appropriate to merely speak of the impact of certain courts on other countries. She believes that in the era of the globalization of constitutional law and human rights, there is “a place of all courts in the global dialogue on human rights.”¹⁹

However, there are scholars who disagree with the notion of a “global judicial dialogue,” claiming that it is both conceptually and factually inaccurate to characterize the manner in which constitutional courts cite and analyze foreign jurisprudence as a form of “dialogue.”²⁰ They hold the view that courts do not cite each other for the purpose of building a dialogue or communicating with each other, and as an empirical matter, one can only speak of a one-sided citation of highly prestigious courts by other, less prestigious courts.²¹

In addition, there are others, including judges and scholars, who are not only skeptics but also opponents of the judicial globalization process. They see this process as a move to an anti-legal and anti-constitutional direction.²² Moreover, some scholars argue that courts, judicial bodies, and judges should not be actors in the globalization process, and that the process of judicial globalization should not be allowed without considerable scrutiny.²³ Some of the most important arguments against the process of judicial globalization, and particularly the use of foreign case law are: “judicial activism” heightened to “judicial adventurism,”²⁴ non-legitimate and non-

¹⁹. The Honourable Claire L'Heureux-Dube, “The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court” (1998) 34:1 Tulsa LJ 15 at 40.

²⁰. David S. Law & Wen-Chen Chang, “The Limits of Global Judicial Dialogue” (2011) 86 Wash L Rev 523 at 527.

²¹. *Ibid* at 523.

²². Kenneth I. Kersch, *supra* note 13 at 386; Jeremy A. Rabkin, *Law without Nations?: Why Constitutional Government Requires Sovereign States*, (Princeton: Princeton University Press, 2005) 22-23.

²³. Jeremy A. Rabkin, *ibid* at 23.

²⁴. Christopher McCrudden, “Judicial Comparativism and Human Rights” in Esin Öricü & David Nelkin, eds., *Comparative Law: A Handbook* (Portland, Oregon: Hart Publishing, 2007) 371.

democratic,²⁵ “cherry-picking,”²⁶ that foreign sources are irrelevant,²⁷ and even that judges are too ignorant about foreign or international law and case law.²⁸

III. THE RELATIONSHIP BETWEEN HUMAN RIGHTS AND THE PROCESS OF JUDICIAL GLOBALIZATION

Human rights are related to and affected by many actors, factors, and mechanisms. One of the most important actors, probably the most important ones influencing and shaping human rights nowadays, are the courts. Courts of all levels, whether international/supranational or national constitutional courts (including supreme courts with constitutional jurisdiction), deal with human rights and have the very last say on their interpretations, disputing resolutions regarding them, and their limitations. As the two-time Supreme Court justice of the US, Charles Evans Hughes brilliantly said: “We are under a Constitution, but the Constitution is what the judges say it is”.²⁹

In the new global era, particularly after the Cold War in the early 90s, courts are influencing and shaping human rights not only as single actors. They are also part of a global network of courts that in its entirety impacts human rights on the national, supranational, transnational and international level. This process, known as *judicial globalization*, is one of the most important mechanisms shaping human rights around the globe.

²⁵. Charles R. Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective*, 1st ed, (Chicago: University Of Chicago Press, 1998); Abram Chayes, “The Role of the Judge in Public Law Litigation” (1975-1976) 89:7 Harv L Rev 1281; William G. Ross, *A Muted Fury: Populists, Progressives, and Labor Unions Confront the Court, 1890-1937* (Princeton: Princeton University Press, 1994); Neal Devins & Louis Fisher, *The Democratic Constitution* (Oxford: Oxford University Press, 2004) 17.

²⁶. *Roper v. Simmons*, 125 S. Ct. 1183 (2005). (“Cherry-picking” phrase was used by Justice Scalia in *Roper* arguing that the majority looked over the heads of the crowd and picked out its friends).

²⁷. The Honourable Ruth Bader Ginsburg, “‘A Decent Respect to the Opinions of [Human] kind’: The Value of a Comparative Perspective in Constitutional Adjudication”, Online: United States Supreme Court <http://supremecourtus.gov/publicinfo/speeches/sp_02-07b-06.html>.

²⁸. Justice Kathryn Nielson, “‘Judicial Globalization’ – What Impact on Canada” (21 October 2009), Online: http://www.brandeis.edu/ethics/pdfs/internationaljustice/Judicial_Globalization_Neilson_Oct_2009.pdf> 1 at 23.

²⁹. Speech before the Chamber of Commerce, Elmira, New York (3 May 1907); published in *Addresses and Papers of Charles Evans Hughes, Governor of New York, 1906–1908* (1908), at 139.

Based on my personal experience as both a judge and an academic, my view is that there is a very strong connection between the development of human rights law at the national, transnational, and international levels and the judicial globalization process. The most obvious relationship is the fact that the process of judicial globalization, similar to other forms of globalization,³⁰ impacts human rights by promoting and fostering their causes at national, transnational, and international levels. On the other hand, this is not just a one-way relationship; human rights also have a very strong impact on the process of judicial globalization. They seem to be not only one of the main principles of the judicial globalization process but also the spirit and the engine of it. In this paper, however, I will mainly focus on the first part of the equation: the impacts of judicial globalization on human rights and its mechanisms.

A. THE MECHANISMS OF A HUMAN RIGHTS-JUDICIAL GLOBALIZATION RELATIONSHIP

Similar to globalization, which the General Assembly affirms is a “complex process of structural transformation, with numerous interdisciplinary aspects, which has an impact on the enjoyment of civil, political, economic, social, and cultural rights, including the right to development,”³¹ judicial globalization, as a component of globalization, has its own mechanisms that impact human rights. In order to unfold these mechanisms, I will look at the various forms of judicial globalization and explain how each of them turns into a mechanism for shaping human rights at all levels. The identification of all forms of judicial globalization is not the focus of this paper, although I make efforts in this paper to identify and classify most of them. Even Slaughter, who was the first to

³⁰. Res. No. 63/176, 20 March 2009, of The UN General Assembly, *supra* note 1.

³¹. *Ibid.*

mention a few categories of judicial interaction,³² and other judicial globalization scholars, have not tried to identify and classify all forms of judicial globalization, leaving a huge gap in the actual literature. Therefore, building upon the existing scholarship, particularly the few categories of judicial interaction introduced by Slaughter,³³ I am contributing by further developing this idea, and providing my own model with other forms of judicial globalization, which also serve as mechanisms of the influence of judicial globalization on human rights. A full understanding of the various forms of judicial globalization is very important for showing how each of them shapes human rights.

a. Constitutional cross-fertilization on human rights

For lack of a better definition from other scholars, I would define the “constitutional cross-fertilization on human rights” instrument as the voluntary use by national constitutional courts (and sometimes even international/supranational courts) of foreign case law from other national or international/supranational courts for persuasive purposes. In other words, it is the migration of human rights jurisprudence from one court to another, across the globe. Generally, case law migrates horizontally among national constitutional courts, which cite each other not because they are obliged to, but because they voluntarily choose to use them as persuasive authorities. It remains a horizontal mechanism even when constitutional courts, such as the US Supreme Court or the Supreme Court of Canada, choose to use foreign case law from international/supranational courts, such as the European Court of Human Rights (ECtHR) or the Court of Justice of the European

³². Anne-Marie Slaughter, *supra* note 2 at 1104. (Anne-Marie Slaughter does not speak of different forms of JG. She identifies “five different categories of judicial interaction: (1) relations between national courts and the ECJ in the EU; (2) interactions between the European Court of Human Rights and national courts; (3) the emergence of “judicial comity” in transnational litigations; (4) constitutional cross-fertilizations; (5) and face-to-face meetings among judges around the world”).

³³. *Ibid* at 1104.

Union (CJEU). Constitutional courts do so, not because they are under the jurisdiction of the latter ones, but because they voluntarily choose to, for persuasive purposes.

This form of judicial globalization is one of the most important mechanisms that foster the migration of human rights around the globe, from one nation to another. Rightly, this process is being considered by the Justice of the Supreme Court of Canada, Claire L'Heureux-Dubé, as a global "judicial dialogue" on human rights. According to her:

[A]s courts look *all* over the world for sources of authority, the process of international influence has changed from *reception* to *dialogue*. Judges no longer simply *receive* the cases of other jurisdictions and then apply them or modify them for their own jurisdiction. Rather, cross-pollination and dialogue between jurisdictions is increasingly occurring.³⁴

Despite the fact that not all agree with her idea,³⁵ the increased migration of human rights cases from one court to another is now a reality. Although a worldwide empirical quantitative and/or qualitative study on the use of foreign case law is still absent, individual or comparative studies on this matter do show such a trend.³⁶ Even if such an increased trend of human rights migration does not exist, this can still be considered a new phenomenon from a human rights point of view.³⁷ What migrates more in the era of human rights and globalization are human rights ideas and case law.³⁸ As the Chief Justice of the Norwegian Supreme Court interestingly puts it:

³⁴. The Honourable Claire L'Heureux-Dube, *supra* note 16 at 17.

³⁵. David S. Law & Wen-Chen Chang, *supra* note 17 at 528; *See also*: Christopher McCrudden, *supra* note 21 at 371; Charles R. Epp, *supra* note 22; Abram Chayes, *supra* note 22; William G. Ross, *supra* note 22; Neal Devins & Louis Fisher, *supra* note 22 at 17.

³⁶. The Honourable Claire L'Heureux-Dube, *supra* note 16 at 16; Adam Liptak, "U.S. Court, a Long time Beacon, Is Now Guiding Fewer Nations", *N.Y. TIMES*, (18 September 2008) at A1; Antonin Scalia, "Outsourcing American Law: Foreign Law in Constitutional Interpretation", Online: (2009) Am. Enter. Inst. 152, <<http://www.aei.org/docLib/20090820-Chapter2.pdf>>. (He predicts that the citation of foreign law in constitutional cases appears to be the "wave of the future").

³⁷ Anne-Marie Slaughter, "A Brave New Judicial World" in Michael Ignatieff *American Exceptionalism and Human Rights*. (Princeton: Princeton University Press, 2005)280; The Honourable Sandra Day O'Connor, "Keynote Address," (2002) 96 Am Soc of Int'l L 348.

³⁸. The Honourable Sandra Day O'Connor, *ibid* at 348.

The Supreme Court has to an increasing degree taken part in international collaboration among the highest courts. It is natural that, insofar as we have the capacity, we should take part in European and international debates and mutual interaction. We should especially contribute to the ongoing debate on the courts' position on international human rights. ... It is the duty of national courts—and especially of the highest courts in a small country—to introduce new legal ideas from the outside world into national decisions.³⁹

Examples of how human rights principles travel around the globe among national courts and produce transnational judicial dialogue are numerous. Good examples that show how national courts look to one another's case laws for assistance when dealing with human rights cases include the death penalty,⁴⁰ freedom of religion and speech,⁴¹ criminal prohibition of sodomy,⁴² gay marriage,⁴³ principle of proportionality,⁴⁴ and lately, cases about prisoners held in Guantanamo Bay.⁴⁵

b. Relationships between international/supranational courts and national courts

Relationship between international/supranational courts and national courts is another very powerful mechanism of judicial globalization that fosters and enhances the use of fundamental human rights and principles. It is exercised through the obligatory, and sometimes voluntary, use of international/supranational human rights case laws from national courts. To date, there has still

³⁹. Carsten Smith, "The Supreme Court in Present-Day Society," in *The Supreme Court of Norway*, ed. Stephan Tschudi-Madsen (Oslo: H. Aschenhoug & Co., 1988) 134-35.

⁴⁰. *Knight v. Florida*, 528 US 990 (1990); *Atkins v. Virginia*, 536 US 304 (002); *Foster v. Florida*, 537 US 990 (2002); *Ropper v. Simmons*, 543 US 551 (2005); *State v. Makwanyane*, CCT 3/94 (South African Constitutional Court).

⁴¹. ECtHR, *Kokkinakis v. Greece* (14307/88), 25 May 1993; ECtHR, *Dahlab v. Switzerland* (42393/98), 15 Feb. 2001; ECtHR, *Leyla Sahin v. Turkey* (44774/98), 29 Jun. 2004; [Grand Chamber] 10 Nov. 2005; ECtHR, *Alexandridis v. Greece* (19516/06), 21 Feb. 2008.

⁴². *Lawrence v. Texas*, 539 US 558 (2003).

⁴³. *Halpern v. Canada* (2002) 28 RFL (5th) 41; *EGALE Canada Inc. v. Canada* (2003) 225 DLR (4th) 472; *Goodbridge v. Department of Public Health*, 798 NE 2d 941 (2004).

⁴⁴. *BVerfGE* 3, 383, 399 (1954); *R (Seymour-Smith) v Secretary of State for Employment* [2000] UKHL 12.

⁴⁵. *Hamdi v. Rumsfeld*, 542 US 466 (2004); *Rasul v. Bush*, 542 US 466 (2004); *Abbasi v. Secretary of State for Foreign and Commonwealth Affairs*, (2002) EWCA Civ 1589; *Kaunda v. President of South Africa*, CCT 23/04; *Hicks v. Ruddock*, (2007) FCA 299; *Khadir v. Canada (Prime Minister)*, 2009 FCA 246, (2009) FCJ No 462.

not been a World Court of Human Rights, which would have such an authority over all the national courts at a global level, though it sort of exists at the regional level on almost every continent.⁴⁶

The best example of this argument can be found in Europe. The interactions between the ECtHR and national courts, as well as the relationship between national courts and the CJEU, particularly after the Treaty of Lisbon, are mainly built around the spread of human rights.⁴⁷ Every individual within Europe has the right to file a claim to the ECtHR against a European state that fails to consider fundamental human rights and principles, after trying domestic remedies and within a certain amount of time.⁴⁸ In addition, national courts are obliged, when dealing with a domestic case on human rights, to consider the case laws of these two courts. This is the best example of how human rights ideas and principles are becoming pan-European and are traveling around every single state of the Council of Europe (CoE) and European Union (EU) through universal understandings and interpretations from international/supranational and national courts. Both courts, with the help of national courts, have managed to build what is called the “European legal order” on human rights, which sometimes even spreads beyond Europe, and by some authors is also being called a sort of “world court of human rights”.⁴⁹

However, the fostering of human rights through the relationship between International/supranational courts and national courts is not only happening in Europe. Although less powerful than in Europe, the same phenomenon also happens in the Americas and Africa.

⁴⁶. Laurence Burgorgue-Larsen & Amaya Ubéda de Torres, *The Inter-American Court of Human Rights: Case Law and Commentary*, 1st edn, (Oxford: Oxford University Press, 2011); Ludovic Hennebel, "The Inter-American Court of Human Rights: The Ambassador of Universalism" (2011) Quebec J. Int'l L 57.

⁴⁷. Anne-Marie Slaughter, *supra* note 2 at 1105, 1007.

⁴⁸. See Online: European Court of Human Rights <<http://www.echr.coe.int/Pages/home.aspx?p=home>>.

⁴⁹. Anne-Marie Slaughter, *supra* note 2 at 1110; Eyal Bienvenisti, “Judges and Foreign Affairs: A Comment on the Institut de Droit International’s Resolution on the ‘Activities of National Courts and the International relations of their States’” (1994) 5:1 EJIL 423.

Under the Organization of American States (OAS), the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights make up the human rights protection system in the Americas.⁵⁰ In contrast to the European human rights system, in the OAS system cases cannot be referred to the Court by individual citizens, but must be referred either by the Inter-American Commission on Human Rights or a state party.⁵¹ In Africa, human rights protection at the international level is exercised through the African Court on Human and Peoples' Rights (ACHPR), which is a continental court established by member states of the African Union to ensure the protection of human and peoples' rights; however, individual citizens, as a rule, cannot directly bring applications against the member states.⁵² Asia and Oceania do not yet have a regional court of human rights, probably because Asian countries vary a lot in their approaches to human rights,⁵³ and in Oceania, most countries have a well-regarded human rights record.⁵⁴

c. Face to face meetings among judges around the world

Judges do not only sit at the bench or in front of a computer, passively engaging in the global judicial dialogue on human rights with their fellow counterparts from around the world simply by using their human rights case laws. In fact, "judges are also meeting face to face."⁵⁵ They have increasingly started to go to other parts of the world to meet fellow judges from other nations or

⁵⁰. See Online: Organization of American States <<http://www.oas.org/en/default.asp>>; Laurence Burgorgue-Larsen & Amaya Ubeda de Torres, *supra* note 38; Ludovic Hennebel, *supra* note 38 at 57.

⁵¹. See Online: Organization of American States <<https://www.oas.org/en/iachr/mandate/what.asp>>.

⁵². Philip Alston & Ryan Goodman, *International Human Rights*, 1st edn, (Oxford: Oxford University Press, 2013); Mutua Makau, "The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties" (1995) 35 *Va J Int'l L* at 339; Nsongurua J. Udombana, "An African Human Rights Court and an African Union Court: A Needful Duality or a Needless Duplication?" (2003) 28:3 *Brook J Int'l L* 811.

⁵³. To understand how much vary human rights in Asia, on the one hand think of China or North Korea as constitutionally communist countries, and on the other hand, have Saudi Arabia or Iran as constitutionally Islamic countries.

⁵⁴. See Online: United Nation, Office of the High Commissioner for Human Rights <<http://www.ohchr.org/EN/UDHR/pages/WorldRecord.aspx>>.

⁵⁵ Anne-Marie Slaughter, *supra* note 2 at 1120.

international/supranational justices. Since the early 1980s, constitutional court justices of Western European countries began meeting every two or three years, and they even started publishing their proceedings.⁵⁶ The institutionalization of face-to-face meetings is also happening among common law countries. The First Worldwide Common Law Judiciary Conference was held in 1995, with delegates from Australia, Canada, Great Britain, India, Ireland, New Zealand, and the United States.⁵⁷ Besides the promotion of human rights such as “fair trial” and “free press,” the purpose of the conference was “a pragmatic judge-to-judge exchange of information on, and analyses of, particular elements of their respective courts, law, and procedures [and take] practical benefits both for themselves individually and for their respective courts.”⁵⁸

There are also other, less formal meetings that have been sponsored by various non-governmental organizations or aid agencies, such as the human rights organization InterRights, based in London,⁵⁹ the Law Association for Asia and the Pacific,⁶⁰ and the American Bar Association Central and Eastern European Law Initiative (ABA-CEELI).⁶¹ Even law schools support face-to-face meetings of judges from around the world by hosting judicial trainings and conferences. For the purpose of my argument, I have classified and grouped this as another instrument/mechanism, namely, Global Judicial Education and Training Institutions.

⁵⁶ Anne-Marie Slaughter, *supra* note 2 at 1120.

⁵⁷ James G. Apple, “Justices, Judges from Common Law Countries Meet in Williamsburg and Washington”, *International Judicial Observer* (September 1995) 1.

⁵⁸ *Ibid.*

⁵⁹ Anne-Marie Slaughter, *supra* note 2 at 1121.

⁶⁰ . See Online: LAWASIA <<http://lawasia.asn.au/chief-justices-of-asia-and-the-pacific.htm>>. (The Biennial Conferences of Chief Justices of Asia and the Pacific have long been viewed as the most notable success of LAWASIA's Judicial Section. These conferences occur in conjunction with LAWASIA Biennial Conferences and continue to be supported by the courts of Asia and the Pacific for the valuable opportunity they provide for an open exchange of views and information amongst Chief Justices in this diverse region).

⁶¹ *CEELI Update*, ABA Int'l L News, July 19, 1991 3.

Finally, it is important to note that face-to-face meetings of judges are not too informal and unimportant for the development of human rights. On the contrary, they have increasingly institutionalized such exchanges, and have even formalized them. Through these meetings, they created “cosmopolitan” and “global” ideas and made them happen. They are establishing global and/or regional judicial networks, formal organizations, associations, and judicial training institutions, as well as building web-based networks. This is now where I turn, starting with the organizations/associations of judges.

d. Building global or regional organizations of judges (associations and networks)

Another form of judicial globalization, which constitutes a powerful mechanism and plays an important role in the development and promotion of human rights across the globe, is the formal building of global and regional organizations of judges; in other words, it is the establishment of various national, regional, and global associations of judges. The complexity of such a mechanism, and the role that it plays in human rights and the judicial globalization process, certainly requires a more thorough analysis; quite surprisingly, it is not given much focus by academics. However, for the sake of our argument, I will provide a few examples of such networks and their roles in the development of human rights across the globe.

The best example is the International Association of Judges (IAJ), which was founded in Salzburg, Austria in 1953. “It is a professional, non-political, international organization, bringing together national associations of judges, not individual judges.”⁶² In other words, it is a network comprised of associations of judges from all over the globe. The main aim of the Association, besides safeguarding the independence of the judiciary, is to help guarantee human rights and

⁶². See Online: International Association of Judges <<http://www.iaj-uim.org/history/>>.

freedoms. Currently, the IAJ encompasses 81 national associations or representative groups of judges from five continents. The Association has four regional groups: i) the European Association of Judges (44 countries); ii) the Ibero-American Group (18 Countries); iii) the African Group (14 countries); and iv) the Asian, North American, and Oceanian Group (10 countries). The Association currently has a consultative status in the United Nations and the Council of Europe.⁶³

Another important association of judges, with approximately 4,000 members from almost 100 countries across the globe, is the International Association of Women Judges (IAWJ).⁶⁴ It was established in 1991 as a non-profit, non-governmental organization, whose members represent all levels of the judiciary worldwide and share a commitment to equal justice and the rule of law. One of the most important goals of this organization is to work with its members around the world “to advance human rights, uproot gender bias from judicial systems, and promote women's access to the courts.”⁶⁵ It also aims to “develop a global network of women judges and create opportunities for judicial exchange through international conferences, trainings, the IAWJ newsletter, website, and online community,” to support and promote “judicial independence” and “equal access to justice.”⁶⁶

Another formal network of judges with regional jurisdiction, which also promotes the development of human rights, is the Organization of Supreme Courts of the Americas.⁶⁷ It is comprised of the supreme courts of 25 countries in the western hemisphere, and was established in October 1995. According to the charter of the organization, its aim is to promote and strengthen

⁶³. *Ibid.*

⁶⁴. See Online: International Association of Women Judges <<http://www.iawj.org/index.html>>.

⁶⁵. *Ibid.*

⁶⁶. *Ibid.*

⁶⁷. See about this Conference online: <http://www.uscourts.gov/news/TheThirdBranch/95-11-01/Organization_of_Supreme_Courts_of_the_Americas_Holds_Conference.aspx>.

“judicial independence and the rule of law among the members, as well as the proper constitutional treatment of the judiciary as a fundamental branch of the State,” as well as to promote human rights.⁶⁸

Other groups that promote the development of human rights include national and regional associations of judges with national and regional jurisdiction,⁶⁹ or international associations with a certain focus, such as the International Association of Refugee Law Judges,⁷⁰ or the International Association of Lesbian, Gay, Bisexual and Transgender Judges.⁷¹

e. Building electronic networks and systems

We live in the era of the Internet and technology. Hence, judges, since they are the same as everybody else, are not an exception. They use these tools for personal reasons and for judicial globalization related purposes. Similar to the previous mechanisms of judicial globalization, building and using electronic networks and systems are instruments used by judges to promote human rights development and better understanding throughout the world.

One of the best examples regarding electronic systems and networks is the “GlobalCourts” research project.⁷² This project is not only used by judges but also was conceived and edited by a judge, namely, Chief Judge Stein Schjolberg of the Moss District Court of Norway. He is the founder of this international project, which links the websites of 129 supreme courts around the world. The purpose of this project is to bring closer constitutional/supreme courts around the globe and help the worldwide exchange of jurisprudence regarding human rights. What a great vision

⁶⁸. *Ibid*; Anne-Marie Slaughter, *supra* note 2 at 1120; Anne-Marie Slaughter, “The Real New World Order”, (1997) 76:5 Foreign Affairs 183.

⁶⁹. IAJ, *supra* note 53.

⁷⁰. See Online: International Association of Refugee Law Judges <<http://www.iarlj.org/general/iarlj/the-association>>.

⁷¹. See Online: International Association of Lesbian, Gay, Bisexual and Transgender Judges <<http://ialgbtj.org/>>.

⁷². See Online: GlobalCourts <www.globalcourts.com>.

and significant contribution of the Norwegian judge. The same signals also come from India, where Justice G.C. Bharuka of the Karnataka High Court has worked extensively to introduce IT into the Indian judiciary system by establishing the electronic system “Worldjudiciary,” which is still underway.⁷³

The International Commission of Jurists (ICJ) is one of the most important electronic systems established by senior judges, attorneys, and academics that are dedicated to ensuring respect for international human rights standards through the law.⁷⁴ The ICJ is comprised of 60 senior judges, attorneys, and academics from around the globe. Its global and regional reports, bulletins, and journals on human rights, and its establishment of a database of decisions related to the independence of the judiciary and human rights from jurisdictions all over the world,⁷⁵ provide just a little taste of what this project is all about. It has won the United Nations Award for Human Rights, the European Human Rights Prize, the Erasmus Prize, and the Wateler Peace Prize, which indicates its role in the worldwide promotion of human rights.⁷⁶

Other important electronic systems not necessarily established by judges, but that are widely used, especially when dealing with human rights cases, are CODICES⁷⁷ and worldlii.org.⁷⁸ CODICES is a system established and operated by the European Commission for Democracy through Law (the Venice Commission) that collects and digests decisions from more than 50 constitutional courts—and courts of equivalent jurisdiction—from around the world. It operates in 24 languages, and the entire database can be searched using a keyword or phrase, allowing judges

⁷³ See Online: Worldjudiciary <<http://worldjudiciary.org/>>.

⁷⁴ See Online: International Commission of Jurists <<http://www.icj.org/>>.

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*

⁷⁷ See Online: European Commission for Democracy through Law <<http://codices.coe.int3>>.

⁷⁸ See Online: World Legal Information Institute <www.worldlii.org>.

and other researchers to quickly find information on particular human rights issues. Worldlii (World Legal Information Institute) is a worldwide system, comprised of 1252 databases from 123 countries, which can also be used by judges when dealing with human rights cases.⁷⁹ In the new millennium, access to foreign sources has expanded through various electronic systems. Two of the most important principal electronic databases that are widely used by judges to easily research foreign and international case law are LexisNexis and Westlaw, which now include legislation and decisions from Australia, Canada, Hong Kong, Russia, Mexico, Ireland, New Zealand, Singapore, the EU, and the UK.⁸⁰

f. Global judicial education and training institutions

Global judicial education and training institutions, both in general and, more specifically, regarding human rights issues, is another different form of the judicial globalization process. They also indicate how judicial globalization is affecting human rights worldwide. As Slaughter rightly observes, the growing support of judges from around the world for global judicial education is an interesting conscious and psychological indicator of the progress of judicial globalization.⁸¹ The best example of judges who do not simply attend judicial training institutions, but also conceive of and establish them, is the International Organization for Judicial Training (IOJT).⁸² Judges from 24 countries around the globe created this institution at a conference held in Jerusalem “in order to promote the rule of law by supporting the work of judicial education institutions around the world.”⁸³ Its mission is realized through “international and regional conferences and other

⁷⁹ *Ibid.*

⁸⁰ See Online: LexisNexis <<https://www.lexisnexis.com/ca/legal/auth/bridge.do?rand=0.842803910859736>>; See Online: Westlaw <<http://westlawinternational.com/>>.

⁸¹ Anne-Marie Slaughter, *supra* note 34 at 280.

⁸² See Online: International Organization for Judicial Training <<http://www.iojt.org/>>.

⁸³ *Ibid.*

exchanges,” and as of February 2014, the IOJT includes 117 member-institutes from 71 countries around the globe.⁸⁴

The International Judicial Academy (IJA) is another educational institution for judges, although it was not established exclusively by judges. It seeks to provide “the highest quality education programs for judges, court administrators, ministry of justice officials, and other legal professionals from countries around the world.”⁸⁵ It was established in the USA in October 1999, and “since its beginning it has hosted program participants from Central and Eastern Europe, South America, Southeast Asia, and China.”⁸⁶ Its central mission, which is worked through seminars, conferences, and exchange projects, is to provide “instruction on how judges and court personnel should function in a modern, fair, efficient, accessible, and transparent court system.” In their programs and publications,⁸⁷ focuses on the “rule of law” and human rights seem to be quite central.⁸⁸

The establishment of judicial educational organizations with worldwide jurisdiction, such as the IOJT and IJA, is another important indicator of the closeness of judges from around the globe. When it comes to the rule of law, judicial independence, and human rights, judges seem to help and push each other to achieve a universal and harmonized understanding of these concepts through global judicial training and education.

Finally, there are other institutions that play an important role in global judicial training. They are not part of our analysis because this paper focuses on judicial globalization mechanisms

⁸⁴. *Ibid.*

⁸⁵. See Online: International Judicial Academy <<http://www.ijaworld.org/>>.

⁸⁶. *Ibid.*

⁸⁷. *Ibid.* (In the spring of 2006, the International Judicial Academy, in partnership with the American Society of International Law, began publication of an on-line judicial magazine, the *International Judicial Monitor*).

⁸⁸. Clifford Wallace, “Globalization of Judicial Education” (2003) 28 Yale J Int’l L 355 at 360.

that include as primary actors, only judges or courts. However, to briefly describe the actors who influence global judicial training, I will mention two important categories. The first category is law schools. NYU Law School, Harvard Law School, Yale Law School, and many other law schools around the globe are increasingly opening their doors to a considerable number of judicial trainings and conferences, helping judges create judicial networks and channels that have the power to foster the cross-fertilization of human rights cases and the use of other mechanisms of judicial globalization.⁸⁹ The second category includes the “transnational civil society,”⁹⁰ foundations, and political activists that are sponsoring an increasing number of seminars, conferences, trainings, and workshops aiming to turn judges into “globalists” or “cosmopolitanists” by adopting a universal understanding of human rights.⁹¹

IV.THE NORMATIVE QUESTION: IS JUDICIAL GLOBALIZATION A SUITABLE PROCESS FOR THE DEVELOPMENT OF HUMAN RIGHTS?

After demonstrating the strong relationship between human rights and judicial globalization and uncovering its main mechanisms, the most important question remaining is the normative question: Is the judicial globalization process suitable for the development of human rights at a national,

⁸⁹. Anne-Marie Slaughter, *supra* note 2 at 1122; Thomas M. Frank, “NYU Conference Discusses Impact of International Tribunals”, 1 *International Judicial Observer* (September 1995) 3; James G. Apple, “British, U.S. Judges and Lawyers Meet, Discuss Shared Judicial, Legal Concerns”, 2 *International Judicial Observer* (January 1996) 1; James G. Apple, “Yale Law School Establishes Seminar on Global Constitutional Issues”, 4 *International Judicial Observer* (June 1997) 2.

⁹⁰. Kenneth I. Kersch, *supra* note 13 at 347. (He uses this term to identify “non-governmental organizations or NGOs, in conjunction with transnational social movements and with the financial backing of private and public contributors, which now “undertake voluntary collective action across state borders in pursuit of what they deem the wider public interest”).

⁹¹. Richard Price, “Transnational Civil Society and Advocacy in World Politics” (2003) 55 *World Pol* 579 at 579; Tamir Moustafa, “Law Versus the State: The Judicialization of Politics in Egypt” (2003) 28 *Law & Soc Inquiry* 883 at 883.

transnational, and international level? To respond to this, I will use both theoretical and empirical tests.

A. THEORETICAL TEST

The theoretical debate over the different human rights concepts held by various schools of thought was part of Section 1. In this section, the paper will focus only on the normativity of the universality of human rights. In other words, we will focus on whether a universal/global, harmonized interpretation of human rights serves them better than a culturally relative approach.

Theoretically, out of the four schools of human rights discourse, three point to and advocate for the universal element and global relevance of human rights. According to the natural school, human rights originate from God, nature, or reason; therefore, human rights embody their universality. From a natural scholar's perspective, human rights can and ought to go global, as long as they remain true to their natural principles.⁹² Protest scholars are also advocates of the universal origin and global relevance of human rights, although they mainly point to the achievement of justice through protesting for human rights.⁹³ Even deliberative scholars, who are now becoming part of the orthodox trend of human rights,⁹⁴ support the universalization of human rights principles through the global adoption of liberal values. They consider the achievement of universality and universalization of human rights to be a positive project that should be achieved on a global scale. For them, it is certainly not a God-given component, but it is achievable through national and global societal agreements. Discourse scholars are the only scholars that are clearly

⁹². Alan Gewirth, *supra* note 9 at 9; Jack Donnelly, *supra* note 9 at 9; Michael J. Perry, *supra* note 9 at 11; Mark Goodale, *supra* note 9 at 37.

⁹³. Jacques Derrida, *supra* note 9 at 3; Neil Stammers, *supra* note 9 at 1; Upendra Baxi, *supra* note 9 at 6; June C. Nash, *supra* note 9 at 213.

⁹⁴. Jurgen Habermas, *supra* note 11 at 126-28; Michael Ignatieff, *supra* note 11 at 83; Sally Engle Marry, *supra* note 11 at 220.

against the idea of the universality and globalization of human rights.⁹⁵ Obviously, since they deny the existence of human rights and do not consider them to be real, any globalization or universalization of human rights would be more than absurd to them. Considering this, it seems that, theoretically, the vast majority of human rights scholars support the universal element of human rights. Although not openly stated by all scholars, a universal interpretation of human rights around the globe would lead to the harmonization, uniformity, and globalization of human rights.

Recently, the normativity of the judicial globalization process has attracted much political, judicial, and academic attention and controversy.⁹⁶ As noted in the first section, judicial globalization scholars and judges engaged in such a debate can be categorized in two groups: advocates and opponents of the process of judicial globalization. The main arguments of the opponents of judicial globalization are a lack of legitimacy and democracy,⁹⁷ the heightening of “judicial activism” to “judicial adventurism,”⁹⁸ the irrelevance of foreign sources,⁹⁹ “cherry-picking,”¹⁰⁰ and the ignorance and incompetence of judges regarding foreign, international, and case law.¹⁰¹

⁹⁵. See: Alasdair MacIntyre, *supra* note 5 at 68-9; Wendy Brown, *supra* note 5 at 453; Makau Mutua, *supra* note 5 at ix-x; Shannon Speed, *supra* note 5 at 181.

⁹⁶. Roger P. Alford, “Four Mistakes in the Debate on “Outsourcing Authority” (2006) 69 Alb L Rev 653 at 656; David S. Law, “Generic Constitutional Law” (2005) 89 Minn L Rev 652 at 699-701; Adam Liptak, *supra* note 33 at A1; Jeremy A. Rabkin, *supra* note 19 at 22-23; Robert H. Bork, *Coercing Virtue: The Worldwide Rule of Judges* (American Enterprise Institute Press, 2003) at 22-25; Roger P. Alford, “Misusing International Sources to Interpret the Constitution” (2004) 98 Am J Int’l L 57 at 61-69; Michael D. Ramsey, “International Materials and Domestic Rights: Reflections on Atkins and Lawrence” (2004) 98 Am J Int’l L 69 at 72-80.

⁹⁷. Kenneth I. Kersch, *supra* note 13 at 380.

⁹⁸. Christopher McCrudden, *supra* note 21 at 371.

⁹⁹. The Honourable Ruth Bader Ginsburg, *supra* note 24.

¹⁰⁰ *Roper v. Simmons*, 125 S. Ct. 1183 (2005), *supra* note 23. (This phrase used by Justice Scalia’s comment in *Roper* that the majority looked over the heads of the crowd and picked out its friends)

¹⁰¹. Justice Kathryn Nielson, *supra* note 25 at 23.

On the other hand, the advocates of judicial globalization argue its benefits: moral universalism;¹⁰² technical, pragmatic, and problem-focused arguments;¹⁰³ diplomatic arguments;¹⁰⁴ an appeal for judicial globalization;¹⁰⁵ historical imperatives; and improvements in judicial decision-making.¹⁰⁶ Kersch notes that judicial globalization advocates can be categorized into three grounds. “The first involves appeals to moral universalism. The second involves appeals to the refinement of technical and administrative competence. And the third involves appeals to diplomatic or foreign policy considerations.”¹⁰⁷ All three grounds are important to judicial globalization and its impacts on the globalization of human rights. However, from a human rights perspective, the “moral universalism” ground seems to be the most appealing. Created by Kant, and later developed by Dworkin,¹⁰⁸ the Kantian constitutional theory of the “universal good” is an essential ground for judicial globalization to promote universal values that come from human rights.¹⁰⁹

If fundamental human rights and principles are the “universal good,” then there is no reason for the participation of courts in global conversations and networks to be limited. Judges should

¹⁰². Anne-Marie Slaughter, *supra* note 2 at 1124.

¹⁰³. Malcolm M. Feeley & Edward L. Rubin, *Judicial Policymaking and the Modern State: How the Courts Reformed America's Prisons* (Cambridge: Cambridge University Press, 1998)348-49; Ken I. Kersch, “The Synthetic Progressivism of Justice Stephen Breyer”, in Earl M. Maltz, ed, *Rhenquist Justice: Understanding the Court Dynamic* (Kansas, 2003) 241 at 241, 243-44, 248-49; Justice Stephen G. Breyer, The Supreme Court and the New International Law, Speech to the American Society of International Law (Apr. 4, 2003), at <http://www.supremecourtus.gov/publicinfo/speeches/sp_04-04-03.html>.

¹⁰⁴. Kenneth I. Kersch, *supra* note 13 at 353.

¹⁰⁵. Justice Sandra Day O'Connor, Remarks at the Southern Center for International Studies 2–3 (Oct. 28, 2003), at http://www.southerncenter.org/Oconner_transcript.pdf>; Anne-Marie Slaughter, *A New World Order*, *supra* note 14 at 65-103; Thomas M. Keck, *The Most Activist Supreme Court in History: The Road to Modern Judicial Conservatism*, 1st edn, (Chicago: University of Chicago Press, 2004), at 48-54; Gary Jeffrey Jacobsohn, “The Permeability of Constitutional Borders” (2004) 82:7 Tex L Rev 1764 .

¹⁰⁶. Vicki Jackson, “Yes Please, I’d Love to Talk With You” (2004) Leg Affairs 43 at 43; Martin S. Flaherty, “Judicial Globalization in the Service of Self-Government” (2006) 20 Ethics & Int’l Aff 477 at 477.

¹⁰⁷. Kenneth I. Kersch, *supra* note 13 at 353.

¹⁰⁸. Ronald Dworkin, *A Matter of Principle* (Harvard University Press, 1985).

¹⁰⁹. Bruce Aune, *Kant's Theory of Morals*. (Princeton, NJ: Princeton University Press, 1979).

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(and I am sure most of them do) understand that we live in an increasingly globalized world, where all humanity has the same roots, and where the natures of justice, fairness, liberty, equality, and dignity are concepts that are embodied within each human being. Therefore, the contribution of every society across the globe is very important to better understand these common grounds, particularly when we speak of human rights. Human rights are universal, and a contribution to and appeal for a universal understanding of them from the elite of a society, such as judges, are helpful for further developing the human rights cause, keeping in mind the best interests of humanity. Through the use of various judicial globalization mechanisms, judges seem to be at the forefront of such a universal understanding, and I argue that they can and should contribute even more.

B. EMPIRICAL TEST

Based on the theoretical grounds of human rights and judicial globalization, universal understanding and globalization of human rights cannot be supported only as a positive development, but should be achieved practically and empirically at the national and international levels. The central actors are national and/or international judges and courts.

Regarding the universal approach and globalization of human rights, empirical data show that they happen through an ongoing process. The actors, factors, and instruments involved are numerous, and they vary from country to country and from national to international or transnational levels. However, I classify and name at least three big instruments, each of which, individually and/or in combination with each other, plays a major role in the universality and process of globalization of human rights nowadays. The first instrument occurs at the *national level* through the *constitutionalization* of human rights. It is a well-known fact that in the absolute

majority of countries, the most fundamental principles and core sets of human rights are part of their constitution.¹¹⁰ The second occurs at the *international level* through the *internationalization* of human rights. This instrument is exercised by the adoption and implementation of fundamental human rights and principles in international and/or supranational legal acts, and by establishing international/supranational human rights institutions.¹¹¹ The third occurs at the *transnational level* through the *transnationalization* of national and international/supranational courts; in other words, it occurs through the process of judicial globalization. In fact, how this third instrument influences and is related to human rights was analyzed in detail in the second section, as a core part of this paper. In this section, I will perform an empirical analysis of the third instrument; in other words, an empirical analysis of the effects of the process of judicial globalization on human rights.

It is now clear that human rights and judicial globalization have a strong mutual relationship, and they do affect each other in many ways and through many mechanisms. As per the focus of this paper, judicial globalization affects human rights through various mechanisms, such as: the constitutional cross-fertilization on human rights; the relationships between international/supranational courts and national courts; face-to-face-meetings of judges around the world; establishing of global/regional organizations/associations of judges; establishing of electronic networks and systems; and establishing of global judicial education and training institutions. Regrettably, fully global empirical research does not exist for any of these instruments.

¹¹⁰. For a view on the world's constitutions to read, search, and compare, see online: Constitute Project <<https://www.constituteproject.org/>>. It shows that the absolute majority of countries have explicitly incorporated human rights in their constitutions.

¹¹¹. Human rights constitute a core part of almost every regional and global international/supranational organization and their legal acts. United Nations, Council of Europe, European Union, African Union, and Organization of American States, are just few examples.

Therefore, for the empirical analysis, this paper will use the existing data, some of which was mentioned in Section 2.

An empirical test is very important for answering the normative question, “How suitable is the judicial globalization process for the development of human rights at national, transnational and international levels?” Based upon all the empirical data on human rights and the various mechanisms of judicial globalization, it is important to evaluate each of the mechanisms individually. I will begin with the “constitutional cross-fertilization of human rights,” which seems to be one of the most important mechanisms and plays a crucial role in the development of human rights at national, international, and transnational levels. Through this mechanism, human rights not only travel across borders but also are harmonized, universalized, and globalized. Most importantly, some scholars even speak of a nascent “global jurisprudence on human rights.”¹¹² Relationships between international/supranational courts and national courts are another powerful mechanism that promotes and develops the universalization and globalization of fundamental human rights and principles. It is exercised through both obligatory and voluntary use of international/supranational human rights case laws from national courts. Although to date there is still not a World Court of Human Rights, which would have authority over all the national courts at the global level, human rights courts exist to a certain extent at the regional level on almost every continent,¹¹³ with Europe’s being the strongest.¹¹⁴ The other four mechanisms, face to face meetings of judges around the world, establishing of global/regional organizations/associations of judges, establishing of electronic networks and systems, and establishing of global judicial

¹¹². Anne-Marie Slaughter, “A Global Community of Courts”, *supra* note 14 at 195.

¹¹³. Laurence Burgorgue-Larsen & Amaya Ubeda de Torres, *supra* note 38; Ludovic Hennebel, *supra* note 38 at 57; Anne-Marie Slaughter, *supra* note 2 at 1110.

¹¹⁴. Eyal Bienvenisti, *supra* note 41 at 423.

education and training institutions, are also powerful tools. They are conscious instruments used to bring judges around the globe closer. When it comes to human rights, it is clear that judges push and help each other to achieve a universal and harmonized understanding, to such an extent that they are sometimes even accused of “judicial activism” or of following a particular “agenda.”¹¹⁵

From both the theoretical and empirical tests, it is clear that judicial globalization is not just one of the three big instruments fostering the globalization and universal approach to human rights. In fact, in the era that we are living, I believe that it is probably the most important and one of the most suitable instruments for the global development of human rights, and it certainly deserves closer scrutiny from academics and the public. Whereas the first two, the *national* and *international* level instruments, require harmonized political action at the national and/or international level, which is very difficult to occur, the judicial globalization instrument that is achieved through courts seems to be the easiest way to go. We are at a stage where the globalization and harmonization of human rights around the globe cannot be achieved through a World Court of Human Rights. The establishment of such a court would require much global political will, and it is still far from becoming a reality. However, I argue that the globalization process of human rights is still progressing, not through a top-down process of national and/or international political action, or through a World Court of Human Rights, but through the bottom-up process of judicial globalization comprised by the global community of constitutional and international/supranational courts. We are at a stage where the participation of judges in the judicial globalization process is a no-turning-back process. When they become part of it, they will not be able to leave it.¹¹⁶ This

¹¹⁵. Michael Kirby, “Judicial Activism” (1997) 27 West Aus L Rev 1 at 1, 10; Alan Mason, “The Judge as Law-maker” (1996) 3 James Cook U L Rev 1 at 1; Joel Bakan, *Just Words: Constitutional Rights and Social Wrongs*, 2nd ed (Toronto: University of Toronto Press, 1997); Peter W. Hogg & Allison A. Bushell, “The Charter Dialogue Between Courts and Legislators” (1997) 35:1 Osgoode Hall LJ 75 at 75, 80.

¹¹⁶. Anne-Marie Slaughter, *supra* note 34 at 298-99.

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is not only because they will grow and become more sophisticated professionally and psychologically but also because they will better understand their own systems, and they will have more appreciation for the foreign systems and the world around them.

V.CONCLUSION

Human rights are affected by many actors, factors, and mechanisms originating from national, transnational, or international grounds. One of the most significant factors is the process of judicial globalization. As this paper showed, human rights and judicial globalization have a strong mutual relationship. The most important mechanisms that build the relationship between judicial globalization and human rights nowadays are: the constitutional cross-fertilization of human rights; relationships between international/supranational courts and national courts; face to face meetings of judges around the world; the establishing of global/regional organizations/associations of judges; the establishing of electronic networks and systems; and the establishing of global judicial education and training institutions.

Another important finding of this paper is the response to the normative question: Is the judicial globalization process a suitable tool for the development of human rights at the national, international, and transnational levels? Both the theoretical and empirical tests that were used to determine the answer to this question showed that judicial globalization is the leading instrument fostering the globalization and universal approach to human rights nowadays. We live in a historical moment where, on the one hand, we need more universal human rights standards around the globe, but on the other, we lack a Global Court of Human Rights to set these standards. The

only current solution for this is, through the judicial globalization, a bottom-up process conducted by the world community of constitutional, supranational, and international courts.